

**REDACTED DECISION – DOCKET NUMBER 11-390 CU – BY – A.M. “FENWAY”
POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION
ON MAY 7, 2012 – ISSUED ON SEPTEMBER 26, 2012**

SYNOPSIS

TAXATION -- SUPERVISION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION -- “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article, . . . and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article . . .” W. Va. Code Ann. § 11-15-3(a) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(b)(26) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect” W. Va. Code Ann. § 11-15-4a (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “Officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “The officers of a corporation or association that are personally liable for consumers [sic] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.” W. Va. Code R. § 110-15-4a.5 (1993).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- “An officer is liable for all amounts which were required to be paid or which became due and payable during the time the person was an officer. W. Va. Code R. § 110-15-4a.5.1 (1993).

OFFICER LIABILITY -- NECESSITY OF FINDING OF FUNDAMENTAL FAIRNESS BEFORE OFFICER LIABILITY CAN BE SHOWN -- Liability upon a corporate officer for the default of his or her corporation, for unpaid taxes, “may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test.” Schmehl v. Helton, Syl. pt. 3, 222 W. Va. 98, 662 S.E.2d 697 (2008).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The assessment in this matter does not contain any amounts which were required to be paid or which became due and payable during the time the Petitioner was an officer.

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF MET -- The Petitioner has met his burden of showing that the assessment issued against him was erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On October 21, 2011, the Respondent issued an officer liability assessment against the Petitioner, personally, as a responsible officer of Company A. The assessment was for the period from December 2009, through November 2010, for combined sales and use tax in the amount of \$_____, interest of \$_____ and additions of \$_____, for a total liability of

\$_____.¹ According to the petition for reassessment, written notice of this assessment was served on the Petitioner on November 10, 2011. Thereafter, on December 6, 2011, the Petitioner timely filed with this Tribunal, a petition for reassessment. An evidentiary hearing was held in this matter on May 7, 2012, at the conclusion of which, the matter became ripe for a decision.

FINDINGS OF FACT

1. In 1995, the Petitioner and two others formed Company A, an “S” corporation.
2. The purpose of the corporation was to build and operate three gas station/convenience store/restaurants in the area of Raleigh County.
3. At the time of incorporation, the Petitioner was President of the corporation.
4. By a letter to board of directors of the corporation, the Petitioner resigned from his position as President of the corporation, effective January 1, 2010.
5. Prior to his resignation the Petitioner was involved in the operation of the corporation including knowledge of its day to day workings and its finances.
6. At various times, both prior to and after the Petitioner’s resignation, the corporation failed to remit consumers sales taxes which it had collected from its customers.
7. The assessment issued against the Petitioner covered the period of December 2009, through November 2010.
8. The corporation was a monthly filer, meaning that its consumers sales tax payments were due to the state on the twentieth day of the month after they were collected.

¹ Some of the months at issue in the officer liability assessment showed a tax liability of zero and the only monies due and owed were for interest and additions. This is due to the fact that the corporation entered into a payment plan which satisfied some of the tax debt.

DISCUSSION

West Virginia Code Section 11-15-3(a) holds that, “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.”² Further, West Virginia Code Section 11-15-4 states that, “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. §§ 11-15-3 (a) and 11-15-4 (West 2010).

According to West Virginia Code of State Rules Section 110-15-4.1, “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before, or at the time, such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993). Additionally, pursuant to West Virginia Code Section 11-15-4(a), “If any vendor fails to collect the tax imposed by section three of this article, he shall be personally liable for such amount as he failed to collect.” W. Va. Code Ann. § 11-15-4(a) (West 2010). The West Virginia consumers sales and service tax statute provides that officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

² Vendor means “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(z) (West 2010). The amount of consumers sales and service tax is “six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales.” W Va. Code Ann. § 11-15-3(b) (West 2010).

The Tax Commissioner has promulgated regulations which flesh out the statutory mandate as to the liability of corporate officers:

4a.1. If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the consumers sales and service tax and any additions to tax, penalties and interest thereon imposed by W. Va. Code § 11-10-1 et seq. may be enforced against them as against the association or corporation which they represent.

4a.5. The officers of a corporation or association that are personally liable for consumers sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and its trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.

4a.6.1. An officer is liable for all amounts which were required to be paid or which became due and payable during the time the person was an officer.

W. Va. Code R. § 110-15-4a (1993).

In 2008, the West Virginia Supreme Court of Appeals addressed due process concerns raised by West Virginia Code Section 11-15-17. In Schmehl v. Helton, 222 W. Va. 98, 662 S.E.2d 697 (2008) the Court addressed the constitutionality of West Virginia Code Section 11-15-17 and the Tax Commissioner's practice of holding officers liable for the defaults of a corporation, merely by virtue of their position as an officer. In Syllabus point 3 the Schmehl Court states:

Under the due process protections of the *West Virginia Constitution*, Article III, Section 10, in the absence of statutory or regulatory language setting forth standards for the imposition of personal liability for unpaid and unremitted sales taxes on individual corporate officers pursuant to *West Virginia Code*, 11-15-17 [1978]; such liability may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test. The burden is on the person seeking to avoid such liability to show with clear and convincing evidence, giving due

deference to the statute's general authorization for the imposition of such liability, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.

Schmehl, at Syl. pt. 3.³

Based upon the Petitioner's position as president, and his involvement in the corporation, it would not be fundamentally unfair to find that he was a responsible officer, pursuant to West Virginia Code Section 11-15-17. However, the assessment in this matter starts with December 2009, meaning the sales tax collected in that month and that was due and payable on January 20, 2010, approximately three weeks after the Petitioner resigned from the corporation. As stated above, the corporation failed to remit sales taxes at various times during calendar year 2009, but the Petitioner has not been assessed for those unpaid taxes, presumably because the corporation entered into a payment plan and paid the unremitted amounts. As a result, the assessment in this matter is for a time period that the Petitioner is not responsible for, pursuant to Section 4a.6.1 of Title 110, Series 15 of the West Virginia Code of State Rules.

Perhaps recognizing the deficiency in the assessment in this matter, the Tax Commissioner took the position, at hearing, that the Petitioner may not have resigned from the corporation, effective January 1, 2010. The Tax Commissioner suggests as such because all of the documents introduced by the Petitioner regarding his resignation are not notarized or certified. Nor did anyone other than the Petitioner testify regarding his resignation date.

The Petitioner introduced four documents regarding his January 2010 resignation; his letter of resignation, the minutes of the board meeting at which he tendered his resignation and two letters, both dated February 27, 2012, from two of the Petitioner's fellow officers in the

³ It should be noted that despite the Schmehl Court's assertion to the contrary, there is regulatory language setting the standards for imposition of personal liability on corporate officers. That language is contained in West Virginia Code of State Rules Section 110-15-4a and is cited above. Nonetheless, this Tribunal continues to adhere to the holding in Schmehl and applies the fundamental fairness test in any officer liability case involving Petitioners who were officers during the period of default.

corporation. In these February 27th letters, Mr. A and Mr. B⁴ stated that the Company A board had accepted Petitioner's tendered resignation on December 31, 2009. The board minutes also reflect the tendering and discussion of Mr. Petitioner's resignation. These minutes were signed by Petitioner, Mr. A and Mr. B.

The Tax Commissioner is correct that these four documents contain no independent verification as to their authenticity. However, this Tribunal is not bound by the West Virginia Rules of Evidence. Rather, it may "admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs." W. Va. Code Ann. § 11-10A-10(c) (West 2010). The undersigned takes that cited language as a directive from the Legislature to use common sense in deciding how much probative effect to give to any piece of evidence or particular testimony. Here, while it is possible that the Petitioner could have created all of the documents introduced, and forged the signatures of his fellow officers, the Tax Commissioner has presented no evidence that such a thing has occurred. Merely suggesting that the Petitioner lied about his resignation date is not enough to overcome the four pieces of evidence, and the Petitioner's own testimony, regarding his resignation date. Additionally, a close review of two of the documents strongly suggests that the Petitioner is not lying.

The Petitioner introduced two identical letters, both dated February 27, 2012, one signed by Mr. B and one signed by Mr. A. The letters state:

I, Mr. A/Mr. B, as an Officer of Company A, member of the Board of Directors, and shareholder, am giving a statement regarding the resignation of Petitioner as an Officer of Company A.

⁴ At the time of incorporation, Mr. A was Treasurer and Mr. B was Vice President. It is unclear what positions in the corporation these men held on February 27, 2012. The letters were signed in their capacity as members of the Board of Directors of Company A.

On December 31, 2009 Company A, accepted the resignation, to be effective on January 1, 2010, presented by Petitioner.

As of January 1, 2010 Petitioner also relinquished all ownership in Company A.

If you have any questions regarding this statement or need any additional information please contact me at 304-_____ or 304-_____.

Sincerely,

_____ Board of Directors

See Petitioner's Ex 2 & 3.

These letters have the same font and layout and clearly were drafted by the Petitioner and brought to Mr. A and Mr. B for signature. Most telling is the statement at the end of the letter encouraging contact with the fellow officers if more information is needed. If the Petitioner were forging the signatures of his fellow officers, he would not encourage contact with them, thereby revealing his own fraud and possibly criminal behavior. Common sense dictates the opposite conclusion, that he went to his fellow officers, perhaps with the knowledge that they would be unwilling to travel to a hearing and testify, and asked them to sign these letters. Common sense and West Virginia Code Section 11-15-17 also strongly suggest that the three men have not all concocted the same lie regarding the resignation date. Due to the fact that Section 17 calls for joint and several liability, the Petitioner's fellow officers would certainly have no motive to wrongfully absolve him of liability for the unpaid taxes. Lastly, if the Tax Commissioner truly believed that the Petitioner had not resigned effective January 1, 2010, he could have contacted Mr. A or Mr. B to inquire as such.⁵ In conclusion, it seems more likely than not that the Petitioner resigned as president of Company A, effective January 1, 2010, and

⁵ The Tax Commissioner would undoubtedly argue that West Virginia Code Section 11-10-5d would prevent him from discussing the Petitioner's assessment with the other officers. However, before the Office of Tax Appeals the Tax Commissioner routinely obtains waivers from Taxpayers, allowing Tax Department employees to divulge confidential return information to third parties.

as a result he has met his burden of showing that the assessment issued against him was erroneous, unlawful, void or otherwise invalid.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. “For the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article, . . . and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article . . .” W. Va. Code Ann. § 11-15-3(a) (West 2010).

4. “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

5. “Each vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1 (1993).

6. A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(b)(26) (West 2010).

7. “If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect” W. Va. Code Ann. § 11-15-4a (West 2010).

8. Officers of an association or corporation “shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010).

9. “The officers of a corporation or association that are personally liable for consumers [sic] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or by-laws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who performs duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to personal liability.” W. Va. Code R. § 110-15-4a.5 (1993).

10. An officer is liable for all amounts which were required to be paid or which became due and payable during the time the person was an officer. W. Va. Code R. § 110-15-4a.5.1 (1993).

11. Liability upon a corporate officer for the default of his or her corporation, for unpaid taxes, “may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test.” Schmehl v. Helton, Syl. pt. 3, 222 W. Va. 98, 662 S.E.2d 697 (2008).

12. The assessment in this matter does not contain any amounts which were required to be paid or which became due and payable during the time the Petitioner was an officer.

13. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010) and W. Va. Code R. § 121-1-63.1 (2003).

The Petitioner has met his burden of showing that the assessment issued against him was erroneous, unlawful, void or otherwise invalid. **WHEREFORE**, it is the final decision of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner, in the amount of \$_____, an amount including interest and additions, for combined sales and use taxes for a number of tax periods from December 31, 2009, through November 30, 2010, should be and hereby is **VACATED** in its entirety.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. “Fenway” Pollack
Chief Administrative Law Judge

Date Entered